No. 89-378

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF ALABAMA, ex. rel. DON SIEGELMAN, ATTORNEY GENERAL, AND DON SIEGELMAN, INDIVIDUALLY AS A CITIZEN OF THE STATE OF ALABAMA,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND LEE M. THOMAS, ADMINISTRATOR OF THE ENIVRONMENTAL PROTECTION AGENCY, AND CHEMICAL WASTE MANAGEMENT, INC., AND THE STATE OF TEXAS,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The Eleventh Circuit

RESPONDENT STATE OF TEXAS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The case below was an action brought by the State of Alabama and three individuals (each of whom happened to be a state official) seeking to enjoin federal funding of a remedial action being undertaken at the Geneva Industries site in South Houston, Texas

pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§9601, et seq. (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 et seq. (1986) (SARA). The Geneva Industries site is an abandoned petrochemical plant which has been listed on the National Priorities List (NPL) as a candidate eligible for remedial action under CERCLA; it is what is commonly known as a Superfund site.

Because the remedial action chosen for the Geneva Industries site involved the disposal of PCB (polychlorinated biphenyl) contaminated soils at a commercial landfill owned by Chemical Waste Management, Inc. near Emelle, Alabama, plaintiffs below brought suit in the United States District Court for the Middle District of Alabama, alleging that EPA's failure to give notice to Alabama that the soils might be sent there violated their right to due process and the EPA's duties under CERCLA and SARA. Plaintiffs sought and obtained a temporary injunction halting the remedial action and later obtained summary judgment ordering the EPA to reopen the Geneva Industries Record of Decision (ROD) to consider Alabama's objections to the remedial action chosen.

The EPA and Chemical Waste Management and the State of Texas, both of whom had intervened, all appealed. The United States Court of Appeals for the Eleventh Circuit reversed the District Court's summary judgment, dissolved the temporary injunction, and ordered the case dismissed. *State of Alabama v. United States Environmental Protection Agency*, 871 F.2d 1548 (llth Cir. 1989). From that decision the State of Alabama and one individual, Don Siegelman, the Attorney General, have applied for a writ of certiorari.

SUMMARY OF ARGUMENT

No writ should be granted because the Court of Appeals was correct in ruling that plaintiffs below lacked standing to raise the constitutional claims they presented and in ruling that the District Court lacked jurisdiction over the statutory claims. Petitioners' lawsuit is nothing more than a taxpayer suit foreclosed by a long line of legal precedent.

REASONS THE WRIT SHOULD BE DENIED

I. THE COURT OF APPEALS WAS CORRECT IN DENYING PETITIONER SIEGELMAN STANDING TO RAISE CLAIMS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. *This is a taxpayer suit.*

Petitioner Don Siegelman, the Attorney General of Alabama, seeks a writ of certiorari in order to pursue his claim of a deprivation of his rights *as an individual* under the Due Process Clause of the United States Constitution, U.S. Const., amend. V. The rights he claims as an individual are no different than the rights of any other Alabama citizen, and, more importantly, the injuries he claims he will suffer are injuries which, as pled by Petitioner, are common to the entire citizenry of Alabama.

It bears repeating that, as Petitioner forthrightly admits, this lawsuit does not challenge the remedial action chosen for the Geneva Industries site (Petition, p. 29). What Petitioner has always challenged is federal funding of that remedy. By so doing, Petitioner has confined his suit to a taxpayer suit and doomed it to the fate of such suits.

Petitioner's claimed injuries are deprivation of "the use and enjoyment of their state resources" (Petition, p. 18). Petitioner's continued use of the *plural* possessive, despite the other plaintiffs' abandonment of further appeal, only serves to underscore the collective nature of his claimed injury. Petitioner has failed to identify how he personally will suffer the direct tangible injury necessary to confer standing. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324 (1984). Instead, he presents only a generalized grievance common to all Alabamians, and that type injury will not support standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483, 102 S.Ct. 752, 764 (1982).

B. *The constitutional violations Petitioner alleges are not the cause in fact of any environmental injury.*

Because the Court of Appeals liberally construed Petitioner's lawsuit to allege environmental injury upon which sufficient injury in fact to support federal court jurisdiction could be based,[1] Petitioner has recast the nature of his lawsuit to fit that mold. In doing so, he has also misunderstood the Court of Appeals finding of no "causal connection between the injury to Alabama's environment and the lack of notice and opportunity to participate in the selection of the remedial action," 871 F.2d at 1556.

Petitioner's complaint that the Court of Appeals based its decision on a "presumption that the plaintiffs would be unable to prevail even if granted their procedural rights" (Petition, p. 23) indicates a basic misunderstanding of why "Plaintiffs injury also is not

[1]The State of Texas would dispute any characterization of the pleadings below as alleging environmental injury and would maintain that plaintiffs always deliberately disclaimed any such injury.

likely to be redressed by a reopening of the Record of Decision," *id.* Contrary to Petitioner's assertion, and as a reading of the entire passage from which it is taken will make clear, the Court of Appeals did not presume that the Administrator would ignore Alabama's protestations if the Record of Decision were reopened. The Court of Appeals simply stated that so long as plaintiffs did not directly challenge the shipment of wastes from Texas to Alabama, the injury they claim is not going to be rectified.

That plaintiffs failed to show the required causal connection between the violations alleged and the injury claimed and that the threatened injury resulting from the action challenged is not likely to be redressed in a judicial action, *Allen v. Wright*, 454 U.S. at 751, 104 S.Ct. at 3324, is easily illustrated by Petitioner's continued insistence that neither Texas nor Chemical Waste Management has been enjoined from carrying out the Geneva Industries remedial action. If this were so,[2] then Petitioner would suffer the alleged injuries whether or not the Record of Decision were reopened and regardless of the Administrator's decision. Similarly, so long as the Emelle facility remains in operation, any environmental injuries complained of will continue whether or not the Geneva remedial actions were ever undertaken.[3]

By purposely avoiding any direct challenge to the active shipment and disposal of toxic wastes to Emelle, Petitioner failed to show the causal connection between the alleged violation and the alleged injury

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[2]Prior to the mandate, all Respondents acted as if it were not and that they were enjoined.

[3]It was undisputed below that the type of materials from Geneva Industries to be disposed of at Emelle were no different from the materials received there for disposal every day.

necessary to confer standing. Because plaintiffs chose to base their lawsuit on federal funding of the remedy but not to challenge the remedy directly, their own actions confined them to a taxpayer's suit.

II. THE COURT OF APPEALS CORRECTLY RULED THAT THE UNITED STATES DISTRICT COURT LACKED JURISDICTION OVER PETITIONERS' STATUTORY CLAIMS.

The Court of Appeals correctly ruled that the "Timing of review" provision of Section 113(h) of CERCLA, 42 U.S.C. §9613(h), restricts federal court jurisdiction to review challenges to remedial actions until after that action has been taken. This is clear, as the Court of Appeals held, both from the language of the statute itself and from its legislative history, 871 F.2d at 1557.

Contrary to Petitioners' assertions, Section 113(h) is meant to preclude judicial review from more than just potentially responsible parties (PRP's) before the remedial action is taken. It is also intended to prevent citizen challenges such as this one. That is obvious from both the specific reference in Section 113(h)(4) to citizen suits for review of remedial actions, 42 U.S.C. §9613(h)(4), and from the separate codification of the pre-SARA case law proscribing pre-enforcement review in Section 113(h)(1), 42 U.S.C. §9613(h)(1). See also 871 F.2d at 1558 (citing cases).

Petitioners' argument that such construction effectively precludes them from ever obtaining judicial review only further demonstrates that the Geneva Industries remedial action will not cause environmental or any other harm to Petitioners. If the remedial action were to cause any such harm to Petitioners, it could be addressed in a suit for judicial review *after* the action has been taken. Petitioners'

insistence that the present suit is their only vehicle through which their injuries can be addressed (Petition, p. 33) demonstrates that it is not environmental injuries of which they complain and that it is not the remedial action which will cause them injury.

In the hue and cry of Petitioners' insistence that they will irreparably suffer the loss of their right to judicial review if they cannot obtain it now, it must be remembered that judicial review of administrative action is not an inherent right, and except where the Constitution requires it, may be granted or withheld as Congress chooses. *Estep v. United States*, 327 U.S. 114, 120, 66 S.Ct. 423, 426 (1946). While the Administrative Procedure Act, 5 U.S.C. §702, generally grants such a right, see *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1510 (1967) (citing cases), it can be restricted by Congress. Congress has clearly done so here, and if Petitioners must suffer a wrong without a remedy it is because Congress specifically chose not to avail them one.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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